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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO IBARRA,

Defendant and Appellant.

A132362

(Napa County
Super. Ct. No. CR156537)

Defendant Mario Ibarra appeals from a judgment imposing three years of formal probation after a plea of no contest to one misdemeanor count of inflicting corporal injury upon a spouse (Pen. Code,¹ § 273.5, subd. (a)) and one misdemeanor count of dissuading a witness (§ 136.1, subd. (b)). He contends the court abused its discretion in requiring as a condition of probation that he “[s]ubmit to a blood, breath or urine test if requested by any law enforcement or probation officer.” He also contends that he should not have to pay an unspecified \$140 fine listed on a document prepared by the probation department that was not imposed by the court. We strike the fine, clarify that the challenged probation condition authorizes testing only for illicit substances, and affirm the judgment in all other respects.

¹ All statutory references are to the Penal Code.

Factual Background

The following summary of facts is taken from the probation report:

“On April 17, 2011 at approximately 0033 hours, Officer Bianco was dispatched to a report of domestic violence in progress. Upon arrival, the officer contacted Pedro Neri Trinidad, the victim’s brother, who said the defendant had just run away from the apartment. The 31-year-old protected victim, Jane Doe, was on the phone and her face was red on the right side and she had a cut on her forehead. The defendant was not located in the apartment or in the downstairs garage.

“The victim was interviewed at the Police Department. She reported she and the defendant have been married for seven months. They were lying in bed and the defendant became angry after an argument and attempted to take her cell phone from her. The victim reported she pinched the defendant on the arm to get him to stop. He threw things at her and she told him she no longer wanted to be with him and wanted him to leave. The victim said she started to throw the defendant’s clothes on the floor and he became very angry and punched her on the right side of the face with a closed fist. She spun around and hit her forehead on the wall, which caused the cut. The victim fell to the floor, got up, grabbed her cell phone, and ran outside to call 911. When she got outside, the defendant grabbed onto her arm and pulled her cell phone from her and ran away. The victim called 911 from her brother’s residence.

“The victim reported she was scared and believed the defendant would come back after her for calling the police. An Emergency Protective Order was granted.

“The officer waited with his certified patrol K9 for a little over an hour. After hearing rustling coming from a fence, a male jumped the fence and looked around. He matched the description of the photo the victim gave the officer. The K9 ran out from behind the tree and the defendant screamed and began to cry. He complied with directives to lie on the ground and was taken into custody for domestic violence and transported to Calistoga Police Department for holding.

“Upon questioning, the defendant said the victim became angry with him and wanted him to move out because their relationship was not working. The defendant said he was yelling at her and she pinched him on the arm, but there were no visible marks. She got out of bed and started throwing his clothes and he got angry for the things she was saying and for punching him, so he hit her on the face with his palm. She hit the floor and he got scared and did not know what to do. When she tried to call for help from her cell phone, he grabbed her arm and took her phone away. He said after he took the phone, he drove to his pastor’s house. He told his pastor what he did and his pastor told him to turn himself in.

“The defendant said he jumped the fence as he was going to go into his apartment to grab some personal items and turn himself in. During the interview, the officer noticed two bruises on the defendant’s arm. When asked, the defendant said one was a ‘hickie’ and the other spot was where the victim had pinched him during an argument.”

The probation report recommends imposition of formal probation with the condition, among others, that defendant be required to submit to a blood, breath or urine test if requested by any law enforcement or probation officer. The report indicates that defendant told the probation officer “he has experimented with alcohol and marijuana on one occasion.”

At the sentencing hearing, defendant objected to the testing condition on the ground that he does not drink and the condition is not reasonably related to the facts of his case. The prosecutor acknowledged that “alcohol was not, as far as [he knew] involved in the incident.” The court confirmed that there was not a recommendation that defendant be prohibited from consuming alcohol, but imposed the generic testing condition noting, “It will assist the defendant in being successful on probation.” Defendant filed a timely notice of appeal.

Discussion

1. Testing Condition

“ ‘In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.’ ” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)² A trial court’s discretion, however, “is not without limits: a condition of probation must serve a purpose specified in the statute.” (*Id.* at p. 1121.) Probation conditions that regulate conduct “ ‘not itself criminal’ ” must be “ ‘reasonably related to the crime of which the defendant was convicted or to future criminality.’ ” (*Ibid.*) “As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or “ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ” ” (*Ibid.*)

In reviewing a trial court’s imposition of probation conditions, appellate courts apply the test announced in *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*): “A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .’ ” Because the *Lent* test is written “in the conjunctive, . . . the three factors must all be found to be present in order to invalidate a condition of probation.” (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65, fn. 3 (*Balestra*).)

As noted above, the trial court imposed as a condition of probation that defendant “[s]ubmit to a blood, breath or urine test if requested by any law enforcement or probation officer.” The record is somewhat unclear whether the testing condition was intended to apply to both illegal drugs and alcohol. The parties argue as if the condition

² Section 1203.1, subdivision (j) provides in pertinent part: “The court may impose and require . . . other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer”

was intended to apply to both. For the reasons discussed below, however, we conclude the condition must be construed as applying to testing only for illegal drugs.³

Because the use or possession of illicit substances is itself criminal, a requirement that the probationer undergo testing for illicit substances relates to conduct that is criminal. (*In re Kacy S.* (1998) 68 Cal.App.4th 704, 710 [the drug testing condition designed to detect the presence of substances whose use is unlawful ‘ “relates to conduct which is . . . in itself criminal” ’].) Thus, contrary to defendant’s suggestion, the condition is valid insofar as it authorizes drug testing.

Alcohol possession and consumption, however, is not an illegal activity and the court did not order that defendant abstain from the use of alcohol. Unlike drug testing, alcohol testing cannot be upheld on the ground that it relates to illegal or prohibited conduct. Moreover, alcohol played no part in the crime for which defendant was convicted and the record contains no evidence that defendant has a history of substance abuse of any kind. Hence, the alcohol testing condition does not relate to the circumstances of the crime and is not reasonably designed to deter future criminal conduct.

Relying on *Balestra, supra*, 76 Cal.App.4th at pages 61-62 and *People v. Smith* (1983) 145 Cal.App.3d 1032, 1034-1035, the People argue: “The trial court’s decision to impose the blood, breath and urine test condition was grounded in part on the notion that staying clean and sober helps probationers live up to the other terms of their probation.”

³ Contrary to defendant’s argument, the testing condition is not overly broad in violation of his Fourteenth Amendment right to due process. This commonly imposed probation condition is printed on the standard probation order form routinely used by trial courts and imposition of such condition is recorded by simply checking the appropriate box. Defendant’s suggestion that the condition could be used for an improper purpose such as “investigating [his] involvement in unsolved crimes, establishing [his] paternity, and determining whether [defendant] suffers from various health condition” is without merit. Although the express language of the condition does not limit testing to a search for prohibited substances, such a requirement is clearly implicit.

In *Balestra*, the court upheld a condition of probation on a narcotics offender who the trial court observed needed treatment for “ ‘what everybody appears to agree is an alcohol problem,’ ” prohibiting him from “possessing or consuming alcoholic beverages or frequenting those places where the sale of alcohol was the primary business.” (*Balestra, supra*, at pp. 62, 68.) The court explained, “Insofar as a probation condition serves the statutory purpose of ‘reformation and rehabilitation of the probationer,’ [citation] it necessarily follows that such a condition is ‘reasonably related to future criminality’ and thus may not be held invalid whether or not it has any ‘relationship to the crime of which the offender was convicted.’ ” (*Id.* at p. 65.) In this case, however, the probation condition is not reasonably designed to reform and rehabilitate defendant because there is no indication that he has a drug or alcohol abuse problem for which he is in need of rehabilitation.

In *People v. Smith, supra*, 145 Cal.App.3d at pages 1034-1035, the court observed that “[d]rinking at any time, even for the social, controlled drinker who can stop at will, can lead to a temporary relaxation of judgment, discretion, and control” and that it “is the undisputed fact that the physical effects of alcohol are not conducive to controlled behavior.” (*Id.* at pp. 1034-1035.) Whatever the truth of this generalization, in that case the probationer was described as “emotionally unstable [and] has a poorly integrated personality” and was convicted of possession of PCP. (*Id.* at pp. 1033, 1035.) There was at least some basis on which to conclude that the probation condition prohibiting the consumption of alcohol was designed to promote his rehabilitation. Absent any basis on which to require alcohol testing, the probation condition must be limited to testing for illegal substances only.

2. Probation Fees and Fines

The probation report includes payment of the following fees and fines as conditions of probation: a \$100 restitution fine; a jail booking fee; a \$400 domestic violence fund assessment; a \$200 battered women’s shelter assessment; a \$40 court

security fee; a \$30 criminal conviction assessment and includes a recommendation that “defendant be ordered to pay a Presentence Report Fee of \$240.00 . . . along with an annual Supervision Fee on an amount not to exceed \$240.00 . . .” At the sentencing hearing, the court confirmed that defendant had “gone over the terms and conditions set forth in the probation report” and that he accepted those terms. After adopting the conditions of probation recommended in the report, the court reiterated that defendant would be subject to certain fees as conditions of probation. The court also imposed “a \$240 probation and a pre-sentence report fee for \$240.”

Following the hearing, the probation department presented defendant with a document summarizing all of the fees, fines and assessments for which he was responsible. In addition to the fees identified above, the documents includes a \$140 unspecified “fine,” a \$300 indigent defense fee and a \$35 unspecified “administrative fee.” Defendant signed the document, agreeing to the amounts listed.

Although defendant initially challenged the propriety of a number of the fees listed on the document on the ground that they were not orally pronounced at the sentencing hearing, in his reply he concedes that all but one of the fees were properly imposed because they were included in the probation report and adopted by the court at the hearing. He argues, however, that because the unspecified \$140 fine was not included in the probation report and not pronounced at the hearing it must be stricken. We agree.

Defendant was given no notice of this fine and thus no opportunity to oppose it in the trial court. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 388-389 [restitution fine may not be imposed where “defendant has no opportunity to address the propriety of imposing the fine or its amount”]; *People v. Thrash* (1978) 80 Cal.App.3d 898, 900-902 [trial court need not orally pronounce probation conditions of which defendant has received notice”].) The People suggest that the fine is enforceable because defendant signed the document “promis[ing] and agree[ing] to the above listed amounts.” The

probation department, however, does not have authority to impose a fine not ordered by the court. Accordingly, the \$140 fine must be stricken.

Disposition

The \$140 fine is stricken. Probation condition No. 21 shall be modified to read:
“Submit to a blood, breath or urine test for illicit substances if requested by any law enforcement or probation officer.” The judgment is affirmed in all other respects.

Pollak, Acting P. J.

We concur:

Siggins, J.

Jenkins, J.